(2)

No. 98-627

FILED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, *et al.*,
Respondents.

and

NORFOLK AND WESTERN RAILWAY COMPANY,
Intervenor on Appeal.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS W. ALVEY, JR.
KURT E. REITZ*
THOMPSON COBURN
P.O. Box 750
Belleville, Illinois 62222-0750
618-277-4700
618-236-3434 (Fax)

Counsel for Norfolk and Western Railway Company

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

21pp

QUESTIONS PRESENTED

Whether the Federal Railroad Administration has authority under the sleeping quarters provisions of the Federal hours of service laws to issue regulations defining "reconstruction" of railroad employee sleeping quarter facilities?

Whether the Federal Railroad Administration's definition of "reconstruction" is reasonable and entitled to deference?

LIST OF PARTIES

The Intervenor in the Eighth Circuit Court of Appeals, Norfolk and Western Railway Company, agrees with the Petitioner's list of the parties involved. As a further statement of the parties involved, Norfolk and Western Railway Company was merged into Norfolk Southern Railway Company on September 1, 1998, and no longer exists. Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
CONCLUSION	16

TABLE OF AUTHORITIES

Page(s)

Cases

Atchison, Topeka and Santa Fe Railway Co. v. Pena, 44 F.3d 437 (7th Cir. 1994), *aff'd*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996) 13

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railroad Co., 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996) 6

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 46 7 U.S. 837, 104 S.Ct. 2278, 81 L.Ed.2d 694 (1984) 8,9,11

Department of the Treasury, Internal Revenue Service v. Federal Labor Relations Authority, 494 U.S. 922, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990) 9

Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1072, 39 L.Ed.2d 270 (1974) 8,10,15

NLRB v. Bell Aerospace Co., 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) 8

Orrego v. 833 West Buena Joint Venture, 943 F.2d 730 (7th Cir. 1991) 15

Pelofsky v. Wallace, 102 F.3d 350 (8th Cir. 1996) 10

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 15

Union v. Skinner, 975 F.2d 1421 (9th Cir. 1992) 14

United Transportation Union v. Dole, 797 F.2d 823 (10th Cir. 1986) 3,10,12,13

Statutes

45 U.S.C. §61, *et seq.* (repealed 1994) 2,14

45 U.S.C.§62 (repealed 1994) ..... *passim*

49 U.S.C. §21101, *et seq.*(1994) 7

49 U.S.C. §21103 (1994) 14

49 U.S.C. §21106 (1994) ..... *passim*

49 U.S.C. §21303 (1994) 6

Regulations

49 C.F.R. §1.49(d) 6

49 C.F.R. §228.101 ..... *passim*

Legislative Matters

H.R. Rep. No. 94-1166 3

Federal Railroad Safety Authorization Act of 1976: Hearings on H.R. 11804 and H.R. 11837 Before the Subcomm. on Transportation and Comm. of the Comm. on Interstate and Foreign Comm., 94th Cong. 6 (1976) 3

Regulatory Matters

41 Fed. Reg. 53,028 (1976) 4,10

41 Fed. Reg. 53,070 (1976) 4,10

43 Fed. Reg. 31,006 (1978) 4,5,10

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Norfolk and Western Railway Company[1] owns a sleeping quarters facility in Moberly, Missouri. This facility was constructed in 1966. In approximately April of 1996, Norfolk and Western decided to remodel its existing Moberly facility. (J.A. 53).[2] In deciding to remodel the existing facility, Norfolk and Western determined that the cost of building a new facility similar to the current facility in Moberly would be approximately $865,000. (J.A. 48, 69). The estimated cost of remodeling the current facility was estimated to be $200,000. (J.A. 49).

After Norfolk and Western had decided to remodel the facility, the United Transportation Union[3] ("UTU"), the Petitioner herein, asked the Federal Railroad Administration ("FRA"), to inspect the Moberly facility to determine if the plans to remodel the facility were in violation of Federal law. On February 27, 1997, the FRA issued a final order, in letter form, finding that neither the Moberly sleeping quarters facility nor the Norfolk and Western's plans to remodel the facility violated the Federal hours of service laws now codified at 49 U.S.C. §21106 (formerly codified at 45 U.S.C. §62(a)(4)). (J.A. 94-96). The FRA concluded that the estimated cost of remodeling the facility represented approximately 25% of the cost to replace a facility.

---

[1] On September 1, 1998, Norfolk and Western Railway Company ceased to exist when it was merged into Norfolk Southern Railway Company. Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation. All three Norfolk entities assert identical interests in this matter, and for ease of simplicity will use "Norfolk and Western" throughout this brief.

[2] The citation "J.A." refers to the Joint Appendix in the Eighth Circuit.

[3] The United Transportation Union's members include Norfolk and Western employees who have been housed at the Moberly facility.

(J.A. 95). Thus, the remodeling of the facility did not constitute "reconstruction" as that term is defined by the FRA in Federal regulations adopted pursuant to the Federal hours of service laws. *See* 49 C.F.R. §228.101(c).

The UTU filed a petition with the Eighth Circuit Court of Appeals seeking review of the FRA's February 27, 1997, decision. In the Eighth Circuit, the UTU contended that Norfolk and Western's decision to remodel the Moberly facility violated the Federal hours of service laws, specifically 49 U.S.C. §21106(2). The UTU argued that the FRA did not have the authority to define the term "reconstruction" as that term is used in 49 U.S.C. §21106(2) and that the FRA erred by not giving this term its "ordinary meaning."

The Eighth Circuit Court of Appeals rejected the UTU's arguments and held that the FRA acted within its authority in promulgating the definition of "reconstruction" at 49 C.F.R. §228.101. The Eighth Circuit further found that the term "reconstruction" as used within the Federal hours of service laws is imprecise and unclear. Accordingly, the Eighth Circuit stated that courts should defer to the FRA's definition of this term, since the FRA is the administrative agency charged with overseeing the Federal hours of service laws. The Eighth Circuit concluded by holding that the FRA's definition of the term "reconstruction" at 49 C.F.R. §228.101(c) is not arbitrary, capricious or contrary to law when considered in light of the Federal hours of services laws.

In 1907, Congress adopted hours of service laws regarding railroad employees. *See* 45 U.S.C. §61, *et seq.* These laws, which limit the number of hours a railroad employee could be required to work, were commonly referred to as the Hours of Service Act ("HSA"). In 1976, Congress amended the HSA to include provisions regarding employee sleeping quarters provided by the railroad. *See* 45 U.S.C. §62(a). Those provisions

provided that a railroad could not begin construction or reconstruction of any sleeping quarters after July 7, 1976, within or in the immediate vicinity or any area where railroad switching or humping operations were performed. 45 U.S.C. §62(a)(4). The HSA did not define the phrase "construction or reconstruction."

These sleeping quarters laws were enacted after an unfortunate explosion in the rail yard in Decatur, Illinois which killed several employees. The laws were intended to provide safety to employees inside sleeping quarters located within the rail yards and to "give the railroads some flexibility in constructing lodgings in the railroad yards." H.R. Rep. No. 94-1166, at 11 (1976).

The original bill considered by Congress required that railroads "provide employees with sleeping quarters . . . [that] are located away from a yard where switching or humping is performed." *Federal Railroad Safety Authorization Act of 1976: Hearings on H.R. 11804 and H.R. 11837 Before the Subcomm. on Transportation and Comm. of the Comm. on Interstate and Foreign Comm.*, 94th Cong. 6 (1976) (setting out H.R. 11804) (hereinafter referred to as "Subcommittee Hearings"). However, at the Subcommittee Hearings, representatives of the railroad industry objected to the proposed bill's application to existing facilities. *See Id.; United Transportation Union v. Dole,* 797 F.2d 823, 826 (10th Cir. 1986) (discussing the amendments to H.R. 11804). These railroad representatives pointed out that if they were required to stop using existing sleeping quarters, a large investment of money in existing facilities would be lost. *Subcommittee Hearings,* 94th Cong. 12223, 190 (statements of Harold Hall, Vice President, Transportation, Southern Railway Company (attaching exhibit from Thomas Phemister, Association of American Railroads), and John German, Vice President, Engineering MoPac Railroad Co., Texas-Pac Railway Co., ChicagoE Ill. Railroad Co., MoIll Railroad Co., and all subsidiaries). After further scrutiny by the House Committee, the proposed bill was revised to its current

form by adding a 1976 grandfather clause which involved the construction and reconstruction of existing facilities.[4] The grandfather clause preserved a railroad's sleeping quarters constructed before 1976.

After Congress adopted the laws relating to the construction and reconstruction of sleeping quarters, the FRA, published interim rules implementing the laws. *See* 41 Fed. Reg. 53,028, 53,030 (1976). In these rules, the FRA defined the word "reconstruction" as either the "replacement of an existing facility with a new facility on the same site" or the "rehabilitation or improvement of an existing facility . . . involving the expenditure, within any period of 18 months, of an amount representing more than 50% of the replacement cost of such facility at the time the program of rehabilitation or improvement began." *Id.* Concurrent with the adoption of these interim rules, the FRA filed a notice of proposed rulemaking for the adoption of final regulations relating to the 1976 amendments to the Hours of Service Act. 41 Fed. Reg. 53,070 (1976).

On July 19, 1978, and after an appropriate period for comment, argument and evaluation, the FRA issued final rules with respect to 45 U.S.C. §62(a)(4). 43 Fed. Reg. 31,006, 31,012 (1978). In defining the terms "construction" and "reconstruction", the FRA found that the actions prohibited by 45 U.S.C. §62(a)(4) "are integrally related to the types of facilities covered." 43 Fed. Reg. 31,008. The final regulations define "reconstruction" as the replacement of an existing facility with a new facility on the same site or the rehabilitation or improvement of an existing facility involving an expenditure of an amount representing no more than 50 percent of the cost of

---

[4] In 1994, Congress recodified the transportation laws including the HSA. The sleeping quarters provisions of the HSA now appear at 49 U.S.C. §21106 (2), and these transportation laws are now referred to as the Federal hours of service laws.

replacing the facility on the same site at the time the rehabilitation or improvement began. 43 Fed. Reg. 31,012 (codified at 49 C.F.R. §228.101(c)(2)). Replacement cost is estimated on the basis of contemporary construction methods and materials. *Id.*

In terms of "reconstruction," the FRA believed that replacement cost of the facility, rather than the original cost of the facility, was a more realistic criteria and more capable of application, since building costs do not follow overall price trends and since the original cost of a facility may not be available at the time "reconstruction" is proposed. 43 Fed. Reg. 31,008. The FRA also found that newer facilities might use different design and material specifications which make the newer facilities not easily comparable in cost to the cost of the original construction. *Id.* Accordingly, replacement cost is to be measured on the basis of contemporary construction methods and materials used at the same site. *Id.*, at 31,009.

REASONS FOR DENYING THE WRIT

As the Eighth Circuit opinion in this case makes clear, the Eighth Circuit fully considered and correctly decided the issues presented. The Eighth Circuit carefully analyzed whether the FRA has the authority to promulgate regulations defining the word "reconstruction" and whether the FRA's definition of "reconstruction" should be accorded judicial deference. The Eighth Circuit's decision is consistent with the decisions of this Court and with other circuits which have considered the Federal hours of service laws and the FRA's authority to adopt regulations pursuant to these laws. This case does not present important issues of law. Therefore, a writ of certiorari is unwarranted and the UTU's petition should be denied.

I. THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE FEDERAL RAILROAD ADMINISTRATION HAD THE AUTHORITY TO DEFINE THE TERM "RECONSTRUCTION" AND THAT THE DEFINITION WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO LAW.

A. The Secretary Of Transportation Has The Authority To Define "Reconstruction."

The Secretary of Transportation ("Secretary") is charged with administering and enforcing the Federal hours of service laws. 49 U.S.C. §21303; *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railroad Co,* 516 U.S. 152, 154, 116 S.Ct. 595, 596, 133 L.Ed.3d 535 (1996). The Secretary has delegated his authority to the Federal Railroad Administrator and the Federal Railroad Administration. 49 C.F.R. §1.49(d). Congress granted the Secretary, and thus the FRA, the authority to make rules and promulgate regulations which implement the sleeping quarters provisions of the Federal hours of service laws. That rulemaking authority includes the authority to issue regu-

lations defining the word "reconstruction." This authority arises from the terms of 49 U.S.C. §21106(2). This statute currently provides that a railroad carrier:

> (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, *as determined under regulations prescribed by the Secretary of Transportation*, in which railroad switching and humping operations are performed.

49 U.S.C. §21106(2) (emphasis added).

By its own words, this statute allows the Secretary to prescribe regulations determining the "construction or reconstruction of sleeping quarters . . . in an area or in the immediate vicinity of an area." 49 U.S.C. §21106(2). The phrase "as determined under regulations prescribed by the Secretary of Transportation" is set off from the entire proceeding phrase by commas. The plain language of the statute reveals Congress' intent to grant the FRA the authority to define the word "reconstruction." The plain language reveals that the phrase "as determined under regulations prescribed by the Secretary of Transportation" modifies the whole phrase "construction or reconstruction of sleeping quarters . . . in an area or in the immediate vicinity of an area" rather than just a part of that phrase.

In addition, Congress' intent in granting the Secretary the authority to define the term "reconstruction" is evident by the fact that Congress did define some words within the Federal hours of service laws, but chose not to define the words "construction," "reconstruction," or "immediate vicinity of an area." *See* 49 U.S.C. §21101. Congress' failure to define these terms implies that such a responsibility should be given to the Secretary and thus, the FRA. Congress did, in fact, define certain words within the Federal hours of service laws, but chose not to define "construction or reconstruction." These words are not

capable of a plain language definition. If the FRA did not have the authority to define "construction or reconstruction," the sleeping quarters provisions would have little practical effect.

This Court has often explained that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). When Congress explicitly leaves a "gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84344, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In the instant statute, Congress expressly left a gap in the meaning of 49 U.S.C. §21106(2) and gave the Secretary and thus, the FRA, the authority to prescribe regulations which determine the meaning of certain words, including "reconstruction."

Further evidence of Congress' intent to give the FRA the authority to issue regulations defining "reconstruction" is found in the fact that Congress has amended portions of the sleeping quarters provisions of the Federal hours of service laws without overruling the FRA's definition of "reconstruction." When Congress revisits a statute giving rise to a long-standing administrative action and does not change the statute, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974). The FRA defined "reconstruction" when it issued a final regulation in 1978. Ten years later Congress amended the sleeping quarters provisions when it added maintenance-of-way employees to the group of employees covered by 49 U.S.C. §21106(1). At that time,

however, Congress did not amend or revoke either the FRA's authority to define "reconstruction" or the FRA's definition.

B. The Federal Railroad Administration's Definition Of The Term "Reconstruction" Is Not Unreasonable, Arbitrary or Capricious.

Since the FRA has the authority to issue regulations defining "reconstruction", those regulations must be accorded judicial deference and controlling weight unless they are arbitrary, capricious or manifestly contrary to the Federal hours of service laws. *See Chevron, 467 U.S. at 843*, 104 S.Ct. at 2782. A court should accept an agency's application of a statute if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. In addition, a court must accept an agency's permissible construction of a statute it is charged with administering, even if that construction is not one the court itself would adopt. *Department of the Treasury, Internal Revenue Service v. Federal Labor Relations Authority*, 494 U.S. 922, 928, 110 S.Ct. 1623, 1627, 108 L.Ed.2d 914 (1990).

The FRA's interpretation of the hours of service laws is a "reasonable accommodation of [the] conflicting policies that were committed to [its] care by the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2783.

The definition of the word "reconstruction" balances a railroad's obligation to provide a safe and proper work environment for its employees, including sleeping quarters, with the financial hardship which could be placed on a railroad that happened to own and use a dormitory facility which was constructed before 1976. The Federal hours of service laws and the legislative history behind them reveal that Congress and the parties appearing before Congress were concerned about the safety of employees and lost investment if railroads could no longer use existing dormitory facilities. The insertion of the 1976 grandfather clause and the words "constructed" and "re-

constructed" provided a compromise between employee safety and the financial consequences which would be imposed on a railroad that had built sleeping quarters prior to 1976. *United Transportation Union*, 797 F.2d at 826. Congress was cognizant of the need to protect the railroads' financial stake in their buildings in light of the comments at the committee hearings as evidenced by the insertion of the grandfather clause. *United Transportation Union*, 797 F.2d at 826.

In defining the word "reconstruction" to include rehabilitation or improvement of a facility only if the expenditure involved an amount more than 50% of the replacement cost, the FRA implemented the concerns of Congress in balancing a railroad's financial interest in existing facilities with the need to provide sleeping quarters a certain distance away from switching and humping operations for the safety of employees. In addition, the FRA was cognizant of modern construction practices when it used the cost of replacing the facility estimated on the basis of contemporary construction methods and materials within the definition of "reconstruction." *See* 43 Fed. Reg. 31,008-31,009. Accordingly, there exists a reasonable, rational basis for the FRA's definition of "reconstruction" as evidenced by the legislative history of the sleeping quarters statute.[5] That definition is not arbitrary, capricious or unreasonable and must be accorded deference by the courts of our country.

---

[5] Even if, as the UTU contends, the FRA does not have the authority to define "reconstruction", its definition of "reconstruction" should still be accorded deference. *Morton*, 415 U.S. at 237, 94 S.Ct. at 1075; *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996). As explained above, the FRA's definition, which was adopted after notice and comment from all interested parties, balances the need for employee safety with the railroad's financial investment in dormitory facilities. *See* 41 Fed. Reg. 53,028; 41 Fed. Reg. 53,070; 43 Fed. Reg. 31,006. The enforcement of the Federal hours of service laws without a workable definition of reconstruction would be arbitrary and capricious.

C. The Eighth Circuit Court of Appeals Correctly Found That The Federal Railroad Administration Has The Authority To Define "Reconstruction" And That The Federal Railroad Administration's Definition Is Reasonable.

The Eighth Circuit acted correctly in holding that the FRA acted within its authority in promulgating the Federal regulations which implement 49 U.S.C. §21106(2), including the definition of "reconstruction," and in deferring to the FRA's construction and application of that regulation in this case. The Eighth Circuit considered, but rejected, the UTU's arguments that the FRA did not have the authority to define reconstruction and that its definition should not be accorded any weight. The Eighth Circuit acknowledged that the term "reconstruction" as used in §21106(2) was imprecise and unclear and in need of definition. Following this Court's decision in *Chevron*, the Eighth Circuit then found that it should defer to the regulations issued by the administrative agency (the FRA) in charge of administering and enforcing the sleeping quarters provisions of the Federal hours of service laws. The Eighth Circuit concluded correctly that the definition of "reconstruction" was not arbitrary, capricious or contrary to law when considered in light of the hours of service laws as a whole and the laws' goal of promoting safe living conditions for railroad workers while preserving a railroad's financial stake in sleeping quarters facilities built prior to July 7, 1976.

The Eighth Circuit's decision follows this Court's standards for reviewing the actions of an administrative agency and upholds the intent of Congress in enacting the hours of service laws and the goals those laws attempt to promote. The UTU's arguments cannot prevail and its petition for writ of certiorari should be denied.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE SCOPE OF AUTHORITY OF THE FEDERAL RAILROAD ADMINISTRATION TO PROMULGATE REGULATIONS UNDER THE FEDERAL HOURS OF SERVICE LAWS.

The UTU contends that this Court should accept their petition for writ of certiorari because there is a conflict among the Seventh, Eighth and Tenth Circuit Court of Appeals regarding the scope of the FRA's authority to promulgate regulations under the Federal hours of service laws. The UTU, however, attempts to create a conflict where none exists.

First, as discussed *supra*, the Eighth Circuit Court of Appeals properly found that the FRA acted within its authority in promulgating the definition of "reconstruction" and that the FRA's interpretation and application of the sleeping quarter provisions of the Federal hours of service laws are entitled to deference. The UTU attempts to create a conflict between the Eighth Circuit's decision and the Tenth Circuit's decision in *United Transportation Union.* The Tenth Circuit in *United Transportation Union*, however, did not discuss or decide whether the FRA had the authority to issue regulations defining the terms in the sleeping quarter provisions of the Federal hours of service laws.[6] *United Transportation Union*, 797 F.2d at 823. The issue of the FRA's authority to issue regulations was not presented in that case.

Still seeking to create a conflict, the UTU refers this Court to Justice Logan's concurrence in *United Transportation Union* where he stated that "a railroad should make no significant additional investment in sleeping quarters near hazardous rail-

---

[6] The *United Transportation Union* case involved resolution of whether a railroad's acquisition of a sleeping quarters constructed by another railroad in 1966 constituted "construction" of sleeping quarters.

road switching or humping operations after July, 1976."[7] *See United Transportation Union*, at 832. This statement by Justice Logan, a concurring justice, does not discuss whether or not the FRA has the authority to issue regulations defining "construction or reconstruction" as those terms are used in the Federal hours of service laws.

Moreover, the UTU ignores the further statement by Justice Logan that "judicial deference generally is reserved for agency views that have been reflected in formal pronouncements or have been known through other means for a long time." *Id.* at 831. This is exactly the situation we have here - according deference to the views of the Federal Railroad Administration which are reflected through formal pronouncements in the form of long-standing federal regulations. Justice Logan's statement, and the Tenth Circuit's decision, are consistent with the Eighth Circuit's decision in this case.

Finally, the UTU points to the Seventh Circuit's decision in *Atchison, Topeka and Santa Fe Railway Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994), *aff'd*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996).[8] for the proposition that the FRA's interpretation of the Federal hours of service laws is entitled to no deference. As acknowledged by the UTU however, the "Seventh Circuit was interpreting a different section of the HSA in that case." (*See UTU's Petition for Writ of Certiorari at 10, n. 4.*) In *Atchison*, the Seventh Circuit considered whether the FRA's new interpretation of hours of service laws relating to whether an employee's time spent waiting for deadhead transportation is time spent on duty was entitled to deference. *See Atchison*, 44 F.3d at 443. The FRA had changed its twenty-three year old interpretation of

---

[7] However, Congress specifically considered this issue and included the grandfather clause for existing sleeping quarters.

[8] This Court affirmed the Seventh Circuit's interpretation of the HSA.

§61(b) of the HSA[9] and phrase "time spent on duty" only after the Ninth Circuit Court of Appeals rejected the FRA's interpretation of the statute in *Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). *Atchison*, 44 F.3d at 440.

In §61(b) of the HSA, Congress did not grant the FRA the express authority to make rules to implement the time on duty provisions. *Id.*, at 441. In this case, unlike in *Atchison*, the FRA has the authority to rule-make and to define the term "reconstruction." Moreover, in *Atchison*, the Seventh Circuit found that the FRA's new interpretation of a railroad employee's time on duty was not entitled to any deference as an interpretive rule. *Id.*, at 442-43. The Seventh Circuit concluded that the FRA's new interpretation could not be accorded even the slightest deference because the new interpretation of time on duty was: inconsistent with twenty-three years of FRA enforcement; not contemporaneously made with the legislation or its relevant amendments; not a thorough and reasoned interpretation; and only based on the fact that the Ninth Circuit Court of Appeals disagreed with the FRA's prior interpretation of the Federal hours of service laws. The Seventh Circuit rejected the FRA's new interpretation of time on duty, since it was not truly the FRA's interpretation, but the Ninth Circuit's.

Contrary to the regulations in *Atchison*, the federal regulations defining "reconstruction" of sleeping quarters must be accorded proper deference by the courts of this country. The regulations defining "reconstruction" have been in place for over twenty years and were adopted near the time the sleeping quarters legislation was enacted by Congress. These regulations were adopted only after the appropriate time for notice and comment. In issuing the regulations, the FRA studied the sleeping quarters provisions of the hours of service laws and the underlying purpose of these provisions. The regulations are consistent with

---

[9] Formerly 45 U.S.C. §61(b), now codified at 49 U.S.C. §21103.

the intent of Congress in protecting railroad workers and have not been changed by the FRA after a "bad" court opinion. The FRA's adoption of the definition of "reconstruction" is thorough, valid and consistent. *See Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991). Accordingly, those regulations are entitled to deference. *See Morton*, 415 U.S. at 237, 94 S.Ct. at 1075.

In spite of the UTU's arguments, no conflict exists among the Federal Courts of Appeals regarding the Federal hours of service laws and the FRA's implementing regulations. Rather, the decisions of the Seventh, Eighth and Tenth Circuit Court of Appeals consistently accord deference to the FRA's rule making and statutory interpretations when that deference is due. Accordingly, this Court should deny the UTU's petition for writ of certiorari.

III. A SERIOUS SAFETY CONCERN IS NOT DIRECTLY IMPACTED BY THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

This Court "does not sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed.897 (1955). Because of the scarcity of resources and the immense number of petitions submitted, this Court properly limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.*, 349 U.S. at 79, 75 S.Ct. at 619. The narrow issue presented by the UTU's petition is not a question of importance to the public. This case is not about the FRA's authority to issue regulations or railroad employee safety, but rather, about whether the UTU and its members can direct a railroad's obligation to house its employees.

The UTU argues that this case presents important issues because it involves the health and safety concerns of railroad employees. What the UTU fails to acknowledge is that the HSA

was amended in 1976 to include the provision relating to sleeping quarters facilities in railyards as a result of Congress' concern about the health and safety of railroad workers. The FRA has furthered Congress' concerns by implementing regulations which ensure that railroads will not circumvent the sleeping quarters provisions and which further the safety related goals of these provisions. For example, the presence of the "50 percent" provision in the definition of reconstruction brings within the scope of "reconstruction" work that a railroad might characterize as something less than "rebuilding", but which nonetheless effectively results in a reconstruction of a facility in the immediate vicinity of an area where switching and humping operations are occurring. The practical effect of the FRA regulations defining the terms of the sleeping quarters provisions is to protect the safety and health of railroad employees while giving some consideration to a railroad's financial interest in existing sleeping quarters.

CONCLUSION

For all of the reasons stated herein, this Court should deny the UTU's petition for certiorari.

Respectfully submitted,

THOMPSON COBURN
THOMAS W. ALVEY, JR.
KURT E. REITZ*
525 West Main
Belleville, Illinois 62222
(618) 277-4700 - Telephone
(618) 236-3434 - Facsimile

*Counsel of Record

Attorneys for Norfolk and Western Railway Company

November 16, 1998